certiorari to and including August 1, 1970, when the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, petitioner could lawfully disobey orders of his local board to report for induction on the ground that the board was defectively constituted.

2. Whether petitioner was misled by the advice of local board officials into not pursuing a claim for conscientious objector status.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted on five counts of a six count indictment which alleged that, on separate occasions in 1967 and 1968, he had failed to obey orders to report for and submit to induction, in violation of 50 U.S.C. App. 462(a). On July 9, 1969, he was sentenced to concurrent terms of five years imprisonment and fined $2,000. The court of appeals affirmed *per curiam* (Pet. 1a-6a).

1. The evidence showed that petitioner registered in early 1963 with Local Board 156 in New Orleans, Louisiana and was classified I-A (3 R. 7-12).[1] He

[1] "R." preceded by the volume number designates the four volume record on file with the Clerk of this Court. Volume 1 contains the district court records, including the June 1969 trial transcript referred to herein as "Tr." Volume 2 contains the transcript of a pretrial motion to dismiss the indictment. Volume 3 is a second pretrial supplement.

was thereafter granted a student (II-S) deferment. Upon completion of his college studies in January 1967, he was again classified I-A (Tr. 66-67). He took no appeal from this classification (2 R. 8).[2] In June 1967, petitioner passed the pre-induction physical (Tr. 47), and was so notified in July 1967 (Tr. 70).

Petitioner was thereafter ordered to report for induction on six occasions, three times in 1967 (September,[3] October and December) and three times in 1968 (January, February and March). On each occasion, he either failed to report at all, or, if he did report, he failed to submit to induction (Tr. 72-89). On December 12, 1967, the day when his third notice to report for induction was issued, petitioner first indicated that he might be a conscientious objector by requesting and obtaining from the local board clerk the special form for conscientious objectors. He never returned the completed form to the local board (2 R. 18-19, 33, 84, 86). Three days later, his retained attorney, who was experienced in Selective Service cases, wrote to the local induction center alleging that when petitioner had reported as ordered for induction on December 15, 1967, as well as on a

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[2] In his first pretrial motion to dismiss petitioner stated he had either complained or inquired as to this classification. In support, he submitted a copy of a handwritten letter that he claimed to have mailed to his local board. Such a letter was never received by the board and the district judge specifically found that petitioner had not taken an administrative appeal (1 R. 101, 2 R. 9, 30, 42, 68, 146).

[3] Petitioner was acquitted on Count 1, which alleged the failure to report in September 1967.

prior occasion, he was prevented from submitting to induction because of his peaceful protest activities. The letter stated that petitioner "stands ready, willing and able to be inducted into the Armed Forces" and advised that if petitioner was reordered for induction and not subjected to harassment, he would take the oath (Ex. G-1, pp. 80-83). Special arrangements were thereafter made for petitioner to be escorted through the induction process by a Selective Service official. Petitioner reported but declined to submit to induction (Tr. 127-136). After the fourth order to report (in January 1968) with which petitioner also failed to comply, he absconded to Canada.[1] Upon his subsequent return to New York, he was apprehended (Tr. 162-163).

2. Before trial, petitioner moved to dismiss the indictment on the ground, *inter alia*, that Negroes had been systematically excluded from his Louisiana draft board (1 R. 19, 2 R. 112, 136, 142). Thereafter, he filed another pre-trial motion challenging the residency composition of his local board. The district court conducted a hearing on both motions.

The facts adduced at this hearing showed that in January 1967, when petitioner was classified I-A, the local board had consisted of five white members (2 R. 141, 191, 225). In May 1967, a Negro member was appointed, raising the board's membership to six (2 R. 143). The former chairman, Mr. Minix, testified that he had served on the local board from about

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[1] As in the court below, petitioner here concedes that he failed to report for induction on at least one occasion (Pet. 6).

1958 to January 1969. Without the knowledge of the Selective Service System, he had moved in 1959 from the parish (county) where the local board was located. When this change in residence was discovered, Mr. Minix was asked to resign; he did so in January 1969 (3 R. 4-5). The other board members were residents of the parish (county) where petitioner's local board was located (3 R. 4). The motions to dismiss were denied by the district court (see Pet. 29a-37a, particularly at 35a-36a).

In an offer of proof at trial, petitioner asserted that several members of the local board were not residents of the area within the county administered by the local board (Pet. 38a-39a).[7]

ARGUMENT

1. Petitioner contends that his local board was improperly constituted with respect to the residence and race of its members and, accordingly, that the board lacked jurisdiction to issue a lawful order directing him to report for induction.

That certain members of the local board may have resided outside the geographic area[7] serviced by the

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[5] The statute requires that board members live in the county (except where provision is made for an inter-county board) over which the board has jurisdiction, 50 U.S.C. App. 460 (b) (3) (see Pet. 10a-11a).

[6] By Selective Service regulation (32 C.F.R. 1604.52(c); see Pet. 15a) board members are required, "if at all practicable" to be residents in the area over which the board has jurisdiction.

[7] While petitioner made an offer of proof to this effect (Pet. 38a-39a), no proof on this issue was actually adduced at trial.

local board did not deprive the orders of the board of legal effect. The residency requirement stems from a regulation (32 C.F.R. 1604.52(c)) which provides that local board members shall be residents of the county in which the local board sits and "shall also, if at all practicable, be residents of the area in which their local board has jurisdiction." Noncompliance with this regulation does not, however, nullify the action of the local board, whose acts, like those of a malapportioned legislature, "are acts of a de facto political authority." *Clay* v. *United States*, 397 F. 2d 901, 911 (C.A. 5), vacated on other grounds *sub nom. Giordano* v. *United States*, 394 U.S. 310; *United States* v. *Brooks*, 415 F. 2d 502 (C.A. 6), certiorari denied, 397 U.S. 969; see also, *Chaudron* v. *United States*, 425 F.2d 605 (C.A. 8), certiorari denied, October 12, 1970 (No. 5426, this Term); *Czepil* v. *Hershey et al.*, 425 F.2d 251 (C.A. 7), certiorari denied, October 12, 1970 (No. 244, this Term).

By the same token, the fact that a Negro did not become a member of the local board until after petitioner had been reclassified I-A—even assuming that this was the result of prior systematic exclusion of Negroes from membership on the local board—did not make the induction orders invalid or give rise to a valid defense absent any showing that this resulted in any discrimination practiced by the board on petitioner. *Clay* v. *United States*, *supra*; *United States* v. *Prince*, 398 F. 2d 686 (C.A. 2), certiorari denied, 393 U.S. 946; *Simmons* v. *United States*, 406

F. 2d 456, 460-461 (C.A. 5), certiorari denied, 395 U.S. 982. No showing of such discrimination was made here.

On the face of things, a more troublesome problem appears to be posed by the fact that, throughout the period of petitioner's dealings with the board (1963-1968), the residence of the chairman was not in accordance with the statutory requirement that board members must reside in the country or political subdivision in which the local board has jurisdiction (50 U.S.C. App. 460(b)(3)).[8] We note, however, that at the time of his original appointment the chairman was qualified to sit as a member. Thus his original appointment was valid, and our submission is that the *de facto* argument is applicable here as well in support of the actions of the local board. The board, as a political entity, had jurisdiction over petitioner (32 C.F.R. 1604.54) and the vote of the board regarding petitioner was unanimous. See *Jessen* v. *United States*, 242 F. 2d 213, 214-215 (C.A. 10).

At all events, the precise issue of the validity of the board's composition is not squarely posed in the particular circumstances of this case since petitioner's acceptability for military service was "not dependent upon an act of judgment by the Board." *Clark* v. *Gabriel*, 393 U.S. 256, 258. Petitioner was required to register when he attained the prescribed age, regardless of the composition of the local board (50

[8] As noted in the Statement, *supra*, pp. 4-5, the chairman had served on the local board from 1958 until his resignation in January 1969.

U.S.C. App. 453; cf. *Toussie* v. *United States*, 397 U.S. 112). Petitioner's deferment as a student from 1963 through 1967 rested on the fact that he met the specific requirements of the governing regulations (see 32 C.F.R. 1622.25); in any event, he can hardly be heard to challenge the composition of a board from which he received a deferment. Moreover, if in 1967 he had met the prescribed statutory conditions for a student deferment and the local board had nevertheless refused to continue him in that classification, he could have appealed administratively or secured preinduction judicial relief since the board at that time had no discretion in the matter. *Breen* v. *Selective Service Board*, 396 U.S. 460, 463-465; cf. *Clark* v. *Gabriel*, *supra*; *McKart* v. *United States*, 395 U.S. 185. Conversely, when in 1967 petitioner provided no information which would warrant continuation of the deferment, the local board had no choice but to classify him I-A (see 32 C.F.R. 1622.10, 1622.25). Petitioner thereafter passed the requisite physical examination and was found to have been called in proper sequence (Pet. 36a-37a). The order of priority of induction was therefore automatic (see 32 C.F.R. 1631.6-1631.7), and the board's role was essentially ministerial. See our Memorandum in Opposition in *Sumrall* v. *United States*, No. 711 Misc., October Term, 1968, certiorari denied, 393 U.S. 991.[9] It is therefore entirely artificial to argue that the

[9] We are providing petitioner's counsel with a copy of our *Sumrall* Opposition.

composition of the board had any impact on this case.[10]

2. Petitioner contends that his orders to report for induction were invalid because he was dissuaded from filing a conscientious objector claim by misleading statements of board officials (Pet. 16-17). Assuming arguendo that petitioner could have filed such a claim at the times to which he refers (see our Brief in *Ehlert* v. *United States*, No. 120, this Term), the fact remains that he made no such claim and he did not establish that he was in fact misled.

Petitioner refers to his testimony that in September 1967 (after his first order to report) he was told by an official of the local board (whom he could not identify) that the board could "not entertain any new information", because of the prior issuance of an order to report for induction (Pet. 5). Petitioner did not, however, inform this official that he wished to apply for conscientious objector status (Pet. 52a-53a). When asked why he had waited until December 1967 to request the form for conscientious objectors from the board, petitioner indicated that he had been unaware that such a classification existed (Pet. 47a). Petitioner further asserts that on December 12, 1967, when he received the special

[10] It is not insignificant in this connection to note that a district judge who has consistently rejected the *de facto* argument in area residency cases (see *e.g. United States* v. *Beltran*, 306 F. Supp. 995 (N.D. Cal.),) has at the same time held that such a defect does not invalidate purely ministerial acts of the local board. *United States* v. *Dominguez*, No. 42908, N.D. Cal., decided September 26, 1969. We are filing a copy of the *Dominguez* opinion herewith.

form from the clerk, he assumed from his conversation with her that she "would not receive the form back" and that pre-existing induction orders "superseded" any information which he might submit in connection with a conscientious objection claim (Pet. 42a, 53a-54a). Although the clerk was called by petitioner as a witness, she was never questioned as to what she said on the occasion when she furnished him with the special form (see 2 R. 140-187, 227-236; 3 R. 7-25).

The jury did not and was not required to accept petitioner's version of the events. See *Gonzales* v. *United States*, 364 U.S. 59, 66. Moreover, petitioner had admittedly discussed with retained counsel the matter of a conscientious objection claim in December 1967 (Pet. 48a-49a, 55a-57a) and, at the time, counsel wrote a letter to the board unequivocally stating that petitioner was willing to be inducted (see *supra*, p. 4). In these circumstances, it is difficult to believe that petitioner would have refrained from filing a conscientious objector claim because of the statement of the board clerk. As his attorney's letter makes plain the reason petitioner did not file the form was that he did not intend to assert such a claim.[11]

[11] Petitioner makes additional arguments, predicated in large measure upon *McKart* v. *United States*, 395 U.S. 185, to the effect that the court below refused to entertain his challenge to the composition of the local board because he had failed to exhaust his administrative remedies by appealing his I-A classification. (See Pet. 8-10, 12, 14-16). Petitioner misreads the opinion below. The basis of the decision was that petitioner's attack on the composition of the board did not en-

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

ROGER A. PAULEY,
EDWARD FENIG,
Attorneys.

OCTOBER 1970.

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title him to an exemption (Pet. 6a). It was only in passing that the decision below pointed out, quite correctly, that this Court had held that McKart was entitled to an exemption (as the sole surviving son) as a matter of "statutory interpretation." 395 U.S. at 197-198. Accordingly, there is no reason to hold this case pending disposition in *McGee* v. *United States*, No. 362, this Term, certiorari granted, October 19, 1970, which, *inter alia*, raises exhaustion issues in a different context.

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